IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA

PLAINTIFFS

v.

CASE NO.: 05-CV-00329 GKF –SAJ

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.

DEFENDANTS

DEFENDANTS' EMERGENCY MOTION TO COMPEL THE SETTING OF A REASONABLE SCHEDULE FOR EXPERT DEPOSITIONS AND THE TIMELY PRODUCTION OF RELATED DOCUMENTS

Defendants respectfully move the Court for an order requiring Plaintiffs to produce the expert witnesses supporting their Motion for Preliminary Injunction ("PI Motion"), as well as documents related to each expert's testimony, in a timely and reasonable manner.

BACKGROUND

This litigation is hardly in its infancy. Indeed, Plaintiffs' First Complaint was filed on June 13, *2005*. Since that time Plaintiffs have secretly worked on their motion for a "preliminary" injunction, and despite the many pending discovery requests, have not produced or even admitted the existence of the experts, documents, and information they were generating as part of that effort. On November 14, *2007*, (just before the holidays),

Plaintiffs finally unveiled their PI motion, demanding the Court's immediate attention to address purportedly "imminent and substantial" harms. PI Mot. at 24.

The PI Motion is supported by the affidavits of nine previously undisclosed expert witnesses, see PI Mot. Exs. 2–5; 13–18, each of whom may testify at the February hearing. Needless to say, understanding the opinions held by these individuals, and exploring the facts underlying them, is essential to Defendants' ability to present any meaningful opposition. Plaintiffs should have identified these experts and produced their documents before the PI Motion was filed under the long-pending discovery requests seeking identification of experts, expert opinions and materials reviewed by experts. At a minimum, they should have produced the information from these experts' files with the surprise motion on November 14. However, since Plaintiffs did not produce this information, upon receipt of the PI Motion Defendants requested Rule 26(a)(2)(B) disclosures for each, along with production of their supporting documentation, prior testimony, and related materials. See Exhibit 1 (letter of Nov. 16, 2007 from Bruce Jones to David Riggs & Richard Garren); Exhibit 2 (Defendant Tyson's request for production of documents). Plaintiffs did not respond to this discovery, but rather delayed. Accordingly, out of an abundance of caution, Defendants subsequently issued subpoenas to each expert seeking essentially the same materials. See Exhibit 3 (letter of Nov. 29, 2007 from Michael Bond to David Riggs).

Plaintiffs' eventual response was to offer the experts for depositions at a place and at times of Plaintiffs' choosing. See Exhibit 4. Plaintiffs proffer was remarkable in at least two respects. First, Plaintiffs were ill disposed towards producing any of the experts' documents. Second, Plaintiffs' proposed order had their experts Olsen and

Fisher appearing next to last, despite the fact that experts Johnson, Teaf, and Harwood apparently based their opinions in whole or in part on data and conclusions generated by Olsen and Fisher. *See, e.g.*, PI Mot. Ex. 4 at 6. To the extent any expert documents were offered, the Plaintiffs were careful to couch it in terms of offering only "reliance materials" (*i.e.*, materials relied upon by the experts as opposed to materials reviewed by the experts).

Defendants raised these concerns about Plaintiffs' unreasonable delays with the Court at a status conference on December 7, 2007. In response, the Court instructed Plaintiffs to make their expert witnesses available to Defendants for deposition on a reasonable schedule, and to produce each expert's documents at least 21 days prior to his or her deposition.

With these ground rules established, Defendants accepted the deposition dates that Plaintiffs had proposed for five of their experts. *See* Exhibit 5. Importantly, under this schedule, the depositions of Olsen and Fisher would have occurred before the depositions of the other experts who relied on their work. *See id.*

Unfortunately, Plaintiffs' pattern of delay has continued. Plaintiffs have withdrawn many of the dates they previously proposed, have moved Olsen and Fisher to the back of the line, and have made other changes as their experts have suddenly discovered conflicts that were not apparent when the Plaintiffs first offered their schedule. *See* Exhibit 6. The final schedule offered by Plaintiffs stands as follows:

Robert S. Lawrence	January 3, 2008
C. Robert Taylor	January 8, 2008
Lowell Caneday	January 11, 2008
Bernard Engel	January 15, 2008
Valerie J. Harwood	January 23, 2008
Gordon V. Johnson	January 25, 2008

J. Berton Fisher	January 29, 2008
Christopher Teaf	January 31, 2008
Roger Olsen	February 6, 2008

See id.

ARGUMENT

Plaintiffs' proposed discovery schedule severely prejudices Defendants' ability to oppose Plaintiffs' PI Motion and fails to satisfy either the letter or the spirit of the Court's directions.

1. Plaintiffs' proposed deposition schedule places an extraordinary burden on Defendants' ability to respond to Plaintiffs' PI Motion. Defendants' oppositions to the PI motions are due on February 8th, a mere two days after Plaintiffs' last scheduled deposition. The hearing follows only 11 days later. During the deposition period Defendants must not only digest Plaintiffs' document productions and depose Plaintiffs' experts but must also retain and work with Defendants' own witnesses to prepare responsive expert testimony. Obviously, Defendants' experts need to see Plaintiffs' documents before they can even begin to analyze their content.

While Plaintiffs and their experts had two years to work up their motion and its supporting expert testimony, Plaintiffs' actions in keeping their experts and documents secret and in refusing to produce their documents even after the PI Motion was filed provide Defendants with only days to cobble together a response. These strategic delays are unfair and unjust to Defendants and this Court.

2. Plaintiffs' proposed deposition schedule is also deficient in the order in which it proposes to produce documents and take depositions. As noted above, several of Plaintiffs' experts rely on the opinions and conclusions of Fisher and Olsen. Yet,

Plaintiffs propose that Defendants depose these two gentlemen on January 29th and February 6th. That order is, respectively, third to last, and dead last in the deposition schedule. This would leave Defendants with mere days to prepare their responses to Plaintiffs' core allegations. It would also seriously undercut Defendants' ability to probe earlier deponents' reliance on Fisher's and Olsen's data and conclusions. Finally, it is apparent to Defendants that the bulk of any documents supporting Plaintiffs' experts' testimony will be produced in relation to Fisher's and Olsen's depositions. If that is the case, Defendants will have either no or minimal opportunity to review and assess these documents before taking the depositions of other witnesses who relied on conclusions drawn from those documents.

Defendants are willing to work out a reasonable and mutually agreeable deposition schedule. Indeed, Defendants agreed to Plaintiffs' proposed dates for the majority of the depositions. But any schedule that holds the most important witnesses and documents for last is unreasonable and unworkable.

3. For the same reasons, Plaintiffs' proposed schedule also seriously prejudices Defendants' ability to prepare for the February 19th hearing. The last scheduled deposition, of a witness upon whose testimony others relied, is proposed to be taken on February 6th. While Plaintiffs had two years to prepare their motion, Defendants' and their experts will have barely two weeks to do so.

4. Plaintiffs have defended their proposed schedule citing the "considerable" burden placed on them by the Court's requirement that they produce supporting documents 21 days prior to each deposition. Any burden on plaintiffs results not from the Court's orders or Defendants' requests but from their own dilatory tactics.

First, as noted, Plaintiffs took some 2 years to seek a preliminary injunction, and months, if not years, to prepare their expert testimony. Defendants' reasonable requests for discovery into those experts' opinions was entirely foreseeable. Indeed, while Plaintiffs prepared their PI Motion they ignored the outstanding discovery requests for documents, data and the identification of experts. Plaintiffs have no excuse for not being prepared to produce materials immediately upon filing of the PI Motion.

Second, as of the date of this motion it has been 35 days since Plaintiffs filed their PI motion, 34 days since Defendants specifically requested production of these materials, and 12 days since the Court required Plaintiffs to comply with those requests within 21 days of each deposition. Yet, Plaintiffs still insist that they need up to an additional month to gather responsive documents. This is simply not reasonable.

If it takes *more than a month* for Plaintiffs' to simply gather and copy the relevant documents and data, how can Defendants be required to review and analyze the documents and data, have relevant experts develop testimony exposing the flaws in those materials, take depositions of the Plaintiffs' experts, and prepare for the PI hearing? Plaintiffs have created a strategy whereby they enjoy years to prepare and afford Defendants only days to respond. Plaintiffs' tactics are fundamentally unfair. Plaintiffs have created a strategy whereby they enjoy years to prepare and afford Defendants only days to respond. Plaintiffs continue to implement a strategy of delaying the production of materials that should have been produced long ago, and the result is fundamentally unfair.

Finally, Plaintiffs' repeated delays cannot be attributed to lack of manpower. Plaintiffs alone controlled the timing of when they would reveal their secret experts and

file their PI Motion. They should have been ready to provide the relevant materials to the Defendants. Indeed, they should have provided those materials previously. And Plaintiffs do not lack the manpower now. The PI Motion itself lists 24 different lawyers representing plaintiffs. Not counting the Attorney General himself, 23 pairs of hands, aided by the expert witnesses themselves and sundry support staff, are certainly able to do a better job marshalling the necessary documentation.

In view of the position in which Plaintiffs' actions place Defendants, the Defendants have no choice but to seek the Court's assistance in establishing a more reasonable schedule. Defendants seek a schedule which makes Fisher and Olsen available no later than early January, and produces all documents relevant to those depositions 21 days in advance. Alternatively, if Plaintiffs are unable to do so, the Court might postpone the date by which Defendants must respond to the PI Motion, as well as the hearing, in order to afford Defendants a fair opportunity to prepare.

Because every day of continued delay prejudices Defendants and this Court, Defendants request that the Court schedule a telephonic hearing without further delay for briefing. We will call the Court's clerk to alert the clerk of this request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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